

IN THE MATTER OF

PAUL S. FERGUS

Registration No. R00412

Respondent

* **BEFORE THE**
* **STATE BOARD**
* **OF CHIROPRACTIC**
* **EXAMINERS**
* **CASE NUMBER: 06-046M**

* * * * *

FINAL OPINION AND ORDER

Pursuant to Md. Code Ann., Health Occ. ("H.O.") § 3-315 (a) and Maryland Code of Regulations (COMAR) 10.43.02.07, The Maryland State Board of Chiropractic Examiners (the "Board") hereby renders the following final decision and order.

I. INTRODUCTION

Mr. Fergus is accused of the unwanted kissing and inappropriate touching of Patient A¹ on June 25, 2006, during the course of a massage at the Elizabeth Arden Red Door Spa and Salon ("the Red Door Spa"), in Gaithersburg, Maryland. On July 26, 2006, the Board received a complaint from Patient A about the events of June 25, 2006. The Board summarily suspended Mr. Fergus's license on August 30, 2006.² On October 25, 2006 the Board served Mr. Paul S. Fergus with charges and a notice of intent to revoke, for violating of certain provisions of the Md. Health Occ. Code Ann. § 3-5A-01, et. seq., ("the Massage Therapists Act"). Specifically, the Board charged Mr. Fergus with violating of the following provisions of § 3-5A-09:

- (1) Fraudulently or deceptively us[ing] a certificate or registration in violation of Md. Code Ann, Health Occ. § 3-5A-09(2);
- (2) Is convicted of or pleads guilty or nolo contendere to a felony or to a crime involving moral turpitude, whether or not any appeal or

¹ In order to protect patient privacy and the confidentiality of health care records, patient names are not revealed in this Order.

² Currently, Mr. Fergus's license remains summarily suspended.

other proceeding is pending to have the conviction or plea set aside in violation of Md. Code Ann, Health Occ. § 3-5A-09(4);

- (3) Does an act that is inconsistent with generally accepted professional standards in the practice of massage therapy in violation of Md. Code Ann, Health Occ. § 3-5A-09(8);
- (4) Engages in conduct that violates the professional code of ethics in violation of Md. Code Ann, Health Occ. § 3-5A-09(20); or
- (5) Knowingly does an act that has been determined by the Board to be a violation of the Board's regulations in violation of Md. Code Ann, Health Occ. § 3-5A-09(21)...

The Board further charged Mr. Fergus with violating its Code of Ethics, Code Md. Regs. tit. 10, § 43.18. Specifically, the Board charged Mr. Fergus with violating subsection .03, of Standards of Practice, which provides in pertinent part:

C. A certificate holder or registration holder shall:

- (2) Engage in professional conduct at all times, with honesty, integrity, self-respect, and fairness;
- (5) At all times respect the client's dignity, autonomy, and privacy.

And with violating subsection .05, Professional Boundaries, which provides in pertinent part:

A. A certificate holder or registration holder shall:

- (1) Maintain professional boundaries, even when the client initiates crossing the professional boundaries of the professional relationship; and
- (2) Respect and maintain professional boundaries and respect the client's reasonable expectation of professional conduct.

B. A certificate holder or registration holder may not:

- (3) Engage in sexual misconduct that includes, but is not limited to:
 - (a) Therapeutic deception;
 - (b) Non bona fide treatment.

Following the filing of charges, a pre-hearing conference took place during which the parties exchanged witness lists and documents, and motion and responses were to be filed with respect to evidentiary matters. Pursuant to H.O. § 3-315 and the Maryland Administrative Procedure Act, Md. Code Ann., State Gov't § 10-226(c)(1)(ii) a hearing on the merits took place on January 18, 200~~6~~⁷. Constituting a quorum were the following Board members: Dr. Margaret E. Renzetti, Vice President of the Board presided; Dr. Duane Sadula; Dr. Kay O'Hara; Dr. E. Brian Ashton; and Issie Shelton Jenkins, Esq. Grant D. Gerber, Board Counsel, James Vallone, J.D., Board Executive Director, and Maria Ware, Board Office Manager, were also present at the hearing. Mr. Fergus appeared and was not represented by counsel. One witness testified for the State: Patient A, the complainant. Mr. Fergus testified on his own behalf. Documents numbered 1A, 1B, 1C, 2, 3A, 3B, 3C, 3D, 4A, 4B, 4C, 5A, 5B, 5C, 6, 7, 8A, 8B, 8C, 8D, 8E, 8F, 8G, 9, 10, 11, and 12 as listed on the "State's Exhibit List" attached to those documents, were also admitted into evidence as State's exhibits numbers 1 through 12. mfg

II. SYNOPSIS OF WITNESS TESTIMONY

The State's first and only witness was Patient A. Patient A described the events of June 25, 2006. Patient A stated that she and a friend went to the Red Door Spa for a massage. Patient A identified Mr. Fergus as the massage therapist who treated her on that day.

Patient A described the massage as an ordinary massage at first. She told Mr. Fergus that she wanted him to concentrate on her neck during the massage. Other than that instruction and some routine health related questions, Patient A and Mr. Fergus did not have any conversation prior to the massage. Patient A stated that she only had on her underwear during the massage, but was properly draped during the massage.

Patient A described the massage she received from Mr. Fergus in detail. According to Patient A, she was on her back under a sheet at the beginning of the massage. Mr. Fergus informed her that he would concentrate on her head and neck area during the massage. Patient A stated that Mr. Fergus massaged her face and neck just as he said would, then placed a warm compress over her eyes.

Next, Patient A said that Mr. Fergus began to massage her feet and legs. From there, Patient A described Mr. Fergus working his way up her body from her feet to head. Patient A testified that Mr. Fergus put both of his hands under the bottom of the drape, then moved his hands up her body and over her breasts and finally to her throat. Patient A stated that immediately after Mr. Fergus touched her breasts and placed his hands on her neck, he kissed her on the lips. After this, Patient A said that she immediately sat up and pushed Mr. Fergus away from her. She said that she felt violated and scared and was worried that Mr. Fergus would block the exit to the room.

Patient A shouted at Mr. Fergus and said, "get the fuck away from me!" Tr. at 21. Patient A described Mr. Fergus's reaction to her outburst, as calm, and said it was "like he was trying to read me." Tr. at 22. Next, Patient A testified that Mr. Fergus said "it was a mistake." *Id.* Patient A testified that Mr. Fergus said, "this has never happened before, I never lost control like this." According to Patient A, Mr. Fergus also said, "Can we talk about this? I'm so sorry." *Id.* Patient A said she responded by yelling at Mr. Fergus and telling him to leave and get the manager. Patient A stated that Mr. Fergus would not leave and instead kept pleading with her to keep incident to herself because he had a son and did not want to lose his job. Patient A testified that she would not relent and eventually Mr. Fergus left the room.

Patient A stated that she reported the incident to the management at the Red Door Spa and later on to the police. After Patient A reported the incident to the Red Door Spa's Manager,

the manager interviewed Mr. Fergus. The Montgomery County Police Department took statements from both Patient A and Mr. Fergus. Patient A testified that she later reported the incident to the Board.

Mr. Fergus testified on his own behalf. Mr. Fergus did not dispute the majority of facts presented by Patient A. Mr. Fergus testified that he did not kiss or inappropriately sexually touch the patient. Rather, Mr. Fergus testified that he accidentally brushed his hand across Patient A's lips during the massage. This accidental brushing of the hand across Patient A's lips, Mr. Fergus testified, was the "mistake" he was referring to when Patient A confronted him.

III. EVALUATION OF WITNESS TESTIMONY

The Board found Patient A to be a very compelling witness. Patient A was emotional during her testimony, but not overwrought or hysterical. She made eye contact with the Board during her testimony. Patient A's demeanor led the Board to conclude that she was telling the truth. The Board did not give much weight to Mr. Fergus's testimony. When questioned by the Board, Mr. Fergus had apparent difficulty looking at the Board members. Mr. Fergus did not speak clearly, audibly or with conviction. Based on the witness's demeanor and other factors, the Board did not find Mr. Fergus's testimony to be particularly credible. In addition, Patient A's story made more sense and seemed much more plausible than Mr. Fergus's version of the events. Quite simply, the Board believed Patient A's version of the events.

IV. FINDINGS OF FACT

After considering the entire record in this case, including the testimony and exhibits entered into evidence at the hearing, and the arguments of counsel, the Board finds the following facts.

1. At all times relevant hereto, the Respondent was registered in Maryland as a Massage Practitioner. The Respondent was first registered by the Board on December 9, 2005.

The Respondent's registration expired on October 31, 2006, but was held open by operation of law while this complaint was adjudicated.

2. On or about July 26, 2006, the Board received a written complaint against Mr. Fergus. Patient A informed the Board of a "sexual assault" during a massage, that occurred on June 25, 2006, at the Red Door Spa, in Gaithersburg, Maryland.

3. The Red Door Spa employed Mr. Fergus from November of 2005 through June of 2006, as a massage therapist.

4. On June 25, 2006, Patient A went to the Red Door Spa in Gaithersburg, Maryland. Patient A had a spa day planned with her friend which was to begin with a massage.

5. The Red Door Spa assigned Patient A's massage to Mr. Fergus. Shortly after arriving and changing her clothes, Patient A met Mr. Fergus, who led her to the massage room. After escorting Patient A to the massage room, Mr. Fergus then left the room briefly so that Patient A could disrobe. Mr. Fergus instructed Patient A to lay face-up under the sheets on the massage table, so that he could begin the massage when he returned. Patient A complied and lay down on the table underneath the sheets and a blanket.

6. Before he began the massage, Mr. Fergus asked Patient A if there was any particular area of the body she wished him to focus the massage on. Patient A informed him that her neck and head needed the most attention. Mr. Fergus informed her he would concentrate on those areas.

7. Mr. Fergus then applied lotion to his hands and began massaging her temples, head, and neck. Upon stopping the massage of Patient A's head and neck area, Mr. Fergus placed a warm compress over her eyelids.

8. Mr. Fergus then moved to the end of the massage table and began rubbing Patient A's feet. He then bound each foot in a warm, wet towel. Mr. Fergus then moved to the left side

of her body and removed the sheets to expose her left leg from the upper thigh to her foot. He massaged her leg, working from the ankles to the upper thigh. Upon completion, he placed the sheets back over her left leg.

9. Mr. Fergus then moved to the opposite side of the table and removed the sheets to expose Complainant's right leg from her upper thigh to her foot. He then proceeded to massage her right leg, working from the ankles to the thigh in the same fashion as he had done with her left leg. With her right leg, however, he spent a longer time massaging her upper thigh.

10. Mr. Fergus then proceeded to move his hands under the sheets and over her pubic region, across her abdomen, and over to the left side of her belly. He then moved both his hands underneath the sheets and forcibly swept his hands from her pelvis, up the sides of her ribcage, and over her breasts. Mr. Fergus "cupped" Patient A's breasts and continued to move his hands up toward her throat, and pressed his lips to hers. Without provocation or invitation, Mr. Fergus kissed Patient A.

11. Patient A immediately sat up, pushed Mr. Fergus away from her, and yelled at him. Mr. Fergus moved back and said "It was a mistake." He also said he was "sorry" and said "this has never happened to me before. I've never lost control like this." Patient A demanded that he leave the room, and he ultimately complied.

12. Patient A reported the incident to the spa's Manager. The Spa's Manager confronted Mr. Fergus, who informed her that "it was a mistake." The Spa's Manager told Mr. Fergus to go home and he complied.

13. Officer's from the Montgomery County Police Department responded and conducted an investigation of the aforementioned incident. Thereafter, on or about June 30, 2006, Mr. Fergus was charged in the District Court of Montgomery County with Fourth Degree Sexual Offense and Second Degree Assault.

14. On or about August 30, 2006, the Board summarily suspended Mr. Fergus's registration to practice massage therapy in the state of Maryland. In its order the Board scheduled a show cause hearing for Thursday, September 21, 2006. Mr. Fergus did not appear at the show cause hearing.

15. On or about October 2, 2006, the Board notified Mr. Fergus it was continuing the summary suspension.

16. On or about October 13, 2006, after a trial in the District Court of Montgomery County, Maryland, Mr. Fergus was convicted of Second Degree Assault for his actions toward the Complainant. Mr. Fergus was sentenced to a 90 day jail sentence, all of which was suspended, and he was placed on probation.

17. Engaging in unwanted kissing and inappropriate sexual touching of a patient on the massage table violates any reasonable understanding massage therapy practice and ethics.

V. CONCLUSIONS OF LAW

Based on the foregoing, the Board concludes, as a matter of law, that Mr. Fergus lacks good judgment and moral character. This constitute grounds for revocation of his license under H.O. § 3-5A-09. Mr. Fergus's actions as outlined above constitute violations of the Act § 3-5A-09(a) (2) (Fraudulently or deceptively uses a . . . registration), (4) (Conviction of a crime of moral turpitude, whether or not any appeal or other proceeding is pending to have the conviction or plea set aside), (8) (Does an act inconsistent with generally accepted professional standards in the practice of massage therapy), (20) (Engages in conduct that violates the professional code of ethics), and (21) (Knowingly does an act that has been determined by the Board to be a violation of the Board's regulations). Mr. Fergus did not comply with the Board's regulations on standards of practice and professional boundaries. Specifically, the Board concludes that Mr. Fergus violated COMAR 10.43.18.03C(2), 10.43.18.03C(5), 10.43.18.05A(1), 10.43.18.05A(2),

and 10.43.18.05A(3). In sum, the Board finds that Mr. Fergus violated its practice act and regulations by his unsolicited and unwanted kissing and inappropriate sexual touching of a patient during a massage.

ORDER

Based on the foregoing Findings of Fact, Conclusions of Law and agreement of the parties, it is this 26th day of March, 2007, by a majority of the Board then serving,

ORDERED that, pursuant to the authority vested in the Board of Chiropractic Examiners by Md. Code Ann., Health Occ. Article, § 3-5A-09, the Respondent's massage therapy certification is hereby **REVOKED**;

ORDERED that Mr. Fergus, is not permitted to apply for reinstatement for FIVE YEARS; and be it further

ORDERED that Mr. Fergus reimburse the Board all reasonable hearing costs; and be it further;

ORDERED that this document is a public record, pursuant to Md. Code Ann., State Gov't Article, § 10-617(h).

MAR 26 2007

Date



Marc Gamerman, D.C.
Board President

NOTICE OF RIGHT OF APPEAL

In accordance with Md. Code Ann., Health Occ. Article, § 3-316, you have a right to take a direct judicial appeal. A petition for appeal shall be filed within thirty days of your receipt of this Findings of Fact, Conclusion s of Law and Order and shall be made as provided for judicial review of a final decision in the Maryland Administrative Procedure Act, Md. Code Ann., State Gov't Article, §§ 10-201 *et seq.*, and Title 7 Chapter 200 of the Maryland Rules.